ABACO ESTATE

v.

SELVARAJAH THAMBOO

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CIVIL APPEAL NO. 22 OF 1983]
15 OCTOBER 1984

LABOUR LAW: *Order of Penolong Pengarah Buruh ordering payment to ex-employee - Appeal against order - Whether appeal should be dismissed.*

APPEAL: *Appellant not the employers - Whether appellant had locus standi - Appeal by notice of appeal - Whether proper - Filing of appeal - Whether out of time.*

The respondent who was employed by Ban Guan Hin Realty Ltd. ("the employers") as a conductor in Abaco Estate which belonged to the employers, resigned on 30 April 1980. On 29 January 1982 he made a complaint to the Labour Department against the employers, that he had not been paid certain sums of money due to him, and that the employers had made an unauthorised deduction from his wages. After inquiring into the dispute under s. 69 of the Employment Act, the Penolong Pengarah Buruh gave a decision on 7 February 1983 in favour of the respondent. The employers were ordered to pay a total sum of RM15,569.33. They appealed. By notice of motion, the respondent applied for the appeal to be dismissed on the grounds of (a) lack of *locus standi* of the appellant, (b) wrong procedure and (c) filing of appeal out of time.

Held:

[1] Where the context so requires, all references to Abaco Estate in the record should be amended so as to refer to Ban Guan Hin Realty Ltd., so that justice may be done. The use of the words "Abaco Estate" in place of the name of the employers was due to a genuine mistake. The respondent was not misled by the fact that Abaco Estate was named as the appellant in the appeal.

[2] The appeal was properly initiated by notice of appeal. Pursuant to s. 77 (2) of the Employment Act, an appeal against a decision made under s. 69 or s. 73 of the Employment Act should be initiated by a notice of appeal as provided by O. 49 r. 2 (1)of the Subordinate Court Rules 1980 and not by motion under O. 55 r. 13 (1) of the Rules of the High Court 1980. Section 77 (2) prevails over O. 55 r. 13 (1) of the Rules of the High Court 1980 because s. 77 (2) has been enacted by Parliament while r. 13 (1) has been made merely by the Rules Committee. *(Yong Yoke Sung & Ors v. Sungei Wang Estate* [1966] 1 MLJ 175 distinguished).

[3] However the appeal was not filed within time, under O. 49 r. 2 (3) of the Subordinate Court Rules 1980. The burden was on the appellant to show that it was filed within time and it had failed to do so. Notice of appeal should have been filed within 14 days from the date on which the decision was pronounced, that is, in the present case, 14 days of the date notice that the appeal record was ready was served on the appellant. O. 55 r. 13 (2) of the Rules of the High Court 1980 did not apply.

[Appeal dismissed.]

Case referred to:
Yong Yoke Sung & Ors. Sungei Wang Estate [1966] 1 MLJ 175

Legislation referred to:
Employment Act 1955, s. 69, 77(1), 77(2), 73
Employment Ordinance 1955, s. 77(2)
Rule Committee Ordinance 1955, s. 4
Rules of the High Court 1980, O. 55 rr. 2(1), 13(1), 13(2)
Rules of Supreme Court 1957, O. 59 r. 13
Subordinate Courts Rules 1980, O. 49 r. 2(1), 2(3)

For the appellant - Anthony Fernandez; M/s. Anthony Fernandez & Partners
For the respondent - Lobo; M/s. Lobo & Associates

JUDGMENT

Wan Hamzah J:

Selvarajah a/1 Thamboo (herein referred to as Selvarajah) was employed by Ban Guan Hin Realty Ltd. (herein referred to as the employers) as a conductor in Abaco Estate which belonged to the employers. Selvarajah resigned on 30 April 1980. On 29 January 1982 he made a complaint to the Labour Department against the employers alleging that he had not been paid certain sums of money which became due during the course of his employment in respect of increments of wages, annual leave pay and overtime wages. He also complained that the employers had made an unauthorised deduction of a sum from his wages. After inquiring into the dispute under s. 69 of the Employment Act, Encik Ahmad bin Suratman, Penolong Pengarah Buruh, gave a decision on 7 February 1983 in favour of Selvarajah and ordered the employers to pay a total sum of RM15,569.33. Hence this appeal by the employers. By this notice of motion Selvarajah asks that the appeal be dismissed on the following grounds:-

(1) Abaco Estate which is named as the appellant in this appeal is not a person and has no *locus standi* to appeal;

(2) the procedure adopted in this appeal is wrong and not in accordance with O. 55 r. 13 of the Rules of the High Court, which requires that an appeal should be made by motion setting out the grounds of appeal, supported by affidavit; or alternatively

(3) the memorandum of appeal dated 4 April 1984 which was filed in this case, was filed out of time in contravention of O. 55 r. 2 (1) of the Rules of the High Court in contravention of O. 55 r. 13 (2) of the Rules of the High Court.

As regards the first ground, evidence shows that it was Selvarajah himself who first used the words "Abaco Estate" in the Labour Department to refer to his employers, and this led the Penolong Pengarah Buruh to refer to the employers as Abaco Estate throughout the proceedings in the Labour Department. On the other hand the employers in their letter of appointment dated 23 March 1959 addressed to Selvarajah made it clear that the employers were Ban Guan Hin Realty Ltd. vide Exhibit A. Although the memorandum Exhibit B dated 29 April 1980 addressed to "whom it may concern" was issued in the name of Abaco Estate, its letter head bears the name of Ban Guan Hin Realty Ltd., which is stated therein as the proprietors of Abaco Estate. Because the proceedings in the Labour Department were initiated by Selvarajah expressly against Abaco Estate, the Penolong Pengarah Buruh expressed the order which he made in the following terms:

> I, Ahmad bin Suratman, hereby order Abaco Estate to pay to the State Director of Labour, Selangor on behalf of Selvarajah a/1 Thamboo the sum of RM15,569.33 being increment of wages, annual leave pay and overtime wages for period from July 1976 to April 1980.

If Selvarajah's objection on the ground that the use of the words "Abaco Estate" is fatal, is to be upheld, it would seem that he would not be able to enforce the order of the Penolong Pengarah Buruh as this order was expressly made against Abaco Estate. I have no doubt that when the words "Abaco Estate" were used in the proceedings in the Labour Department and in this appeal all the parties concerned understood those words as referring to the employers Ban Guan Hin Realty Ltd., the owners of Abaco Estate, and that they mean by those words to refer to Ban Guan Hin Realty Ltd. Therefore I am prepared to order that where the context so requires all references to Abaco Estate in the record should be amended so as to refer to Ban Guan Hin Realty Ltd., so that justice may be done. I am satisfied that the use of the words "Abaco Estate" in place of Ban Guan Hin Realty Ltd. was due to genuine mistake, and that Selvarajah has not been misled by the fact that Abaco Estate was named as the appellant in this appeal.

In my judgment Selvarajah also fails on the second ground. Section 77 of the Employment Act provides-

> 77(1) If any person whose financial interests are affected is dissatisfied with the decision or order of the Director General under s. 69 or s. 73 such person may appeal to the High Court.
>
> (2) Subject to any rules made under s. 4 of the Subordinate Court Rules Act 1955, the procedure in an appeal to the High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require.

The procedure in a civil appeal from a Sessions Court is contained in and regulated by the Subordinate Court Rules 1980, under which an appeal is initiated by a notice of appeal and not by motion. Therefore pursuant to s. 77 (2) an appeal against a decision made under s. 69 or 73 should be initiated by a notice of appeal and not by motion.

Section 77 (2) is in conflict with r. 13 (1) of O. 55 of the Rules of the High Court 1980, which provides-

> 13.(1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by motion setting out the grounds of appeal, supported by affidavit and, if the Court so directs at the hearing, by oral evidence.

In my Judgment s. 77 (2) prevails over r. 13 (1) because s. 77 (2) has been enacted by Parliament and r. 13 (1) has not been made by Parliament but merely by the Rules Committee.

It is true that the Subordinate Court Rules 1980 have been made under s. 4 of the Subordinate Court Rules Act 1955, which provides to the effect that rules made under that section are subject to any rules of Court made under the Courts of Judicature Act 1964. Since the Rules of the High Court 1980 have been made under the Courts of Judicature Act 1964, the Subordinate Court Rules 1980 are subject to the Rules of the

High Court 1980. But this does not mean that O. 55 r. 13 (1) of the Rules of the High Court 1980 should be adopted in place of O. 49 r. 2(1) of the Subordinate Court Rules 1980, which provides-

> Appeal to the High Court shall be brought by giving notice of appeal in Form 140.

There is no question of the said O. 55 r. 13 (1) prevailing over the said O. 49 r. 2 (1) because there is no conflict between the two provisions. The said O. 55 r. 13 (1) applies to an appeal from the decision of "any person or body of persons", whereas the said O. 49 r. 2 (1) applies to an appeal from the decision of a subordinate Court.

For contending that this appeal should have been brought by way of motion under O. 55 r. 13 of the Rules of the High Court 1980 reliance was placed on the ruling by the Federal Court in the case of *Yong Yoke Sung & Ors. v. Sungei Wang Estate* [1966] 1 MLJ 175 to the effect that an appeal similar to the present one should be brought by way of motion setting out the grounds of appeal supported by affidavit. No one should doubt the correctness of the decision of the Federal Court in that case, but I do not think that that ruling which was made in 1965 is applicable to the present day appeals from decisions made under s. 69 of the Employment Act. The decision of the Federal Court in that case was made when the Rule Committee Ordinance 1955 in its old form was in force. At that time the Rules of the Supreme Court 1957 were also in force and had not been replaced by the Rules of the High Court 1980. As pointed out by Pike CJ in that case, s. 77 (2) of the Employment Ordinance 1955 at that time should be read as follows:

> Subject to any rules made under s. 4 of the Rule Committee Ordinance 1955, the procedure in an appeal to the High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require.

In his Judgment Pike CJ stated-

> Section 4 of the Rule Committee Ordinance 1948 has been repealed and replaced by s. 4 of the Rule Committee Ordinance 1955. In each section there was provision for the making of rules for `regulating and prescribing the procedure on appeals from any Court or person(s) to the Court of Appeal or the High Court' ...

Pike CJ was referring to s. 4(b) of the Rule Committee Ordinance 1955, the relevant parts of which read as follows:

> 4. It shall be the duty of the Rule Committee from time to time and as occasion may require to make rules for the following purposes-
>
> (a) ...
>
> (b) for regulating and prescribing the procedure in proceedings by way of appeal from any Court or persons to the Court of Appeal or the High Court, the time within which any such appeal may be brought, and ...

At that time s. 4 of the Rule Committee Ordinance 1955 provided for the function of one and the same Rule Committee for making rules for regulating the procedure and the practice to be followed in the High Court and in Subordinate Courts respectively. It also provided for the function of the same Rule Committee to make rules for prescribing the procedure in proceedings by way of appeal to the High Court not only from the decisions of subordinate Courts but also from the decisions of persons like the decision of

Penolong Pengarah Buruh in the present case. Thus the Rules of the Supreme Court 1957 were made by that Rule Committee (established under s. 3) pursuant to the powers conferred by s. 4 of the Rule Committee Ordinance 1955. Therefore the Rules of the Supreme Court 1957 were rules referred to in the opening words of s. 77 (2) of the Employment Ordinance, i.e. the words "Subject to any rules made under s. 4 of the Rule Committee Ordinance 1955". I believe that if they were not so, the Federal Court would not have held that O. 59 r. 13 of the Rules of the Supreme Court 1957 applied in that case. That this was so is shown by the fact that Pike CJ took pains to explain that the reference to s. 4 of the Rule Committee Ordinance 1948 contained in the opening words of s. 77 (2) of the Employment Ordinance must be construed as a reference of s. 4 of the Rule Committee Ordinance 1955. Pike CJ also stressed that the opening words of the s. 77 (2) were not mere surplusage, on the ground that a perfectly sensible meaning could be given to them.

It should be noted that in contrast with the position at the time of the *Yong Yoke Sung's* case, the present s. 77 (2) of the Employment Act does not provide that the section itself is subject to any rules made under the Courts of Judicature Act 1964.

In my Judgment O. 55 r. 13 (2) of the Rules of the High Court 1980 does not apply also in the present case, to fix the time limit within which to initiate the appeal, because r. 13(2) applies to a particular case only on the basis and in the event that r. 13 (1) applies to that case. There is also another reason why r. 13 (2) does not apply to the present case. Rule 13 (2) provides -

> Unless otherwise provided by any written law, such appeal shall be made within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing whichever is the later date.

The question is whether there is written law which provides otherwise. The answer is that there is such written law. It has been shown above that by virtue of s. 77 (2) of the Employment Act the Subordinate Court Rules 1980 apply to the present case. Under O. 49 r. 2 (3) of those Rules notice of appeal must be filed within 14 days from the day on which the decision was pronounced. Thus the said O. 49 r. 2 (3) is a written law which is referred to in O. 55 r. 13 (2) of the Rules of the High Court 1980 as written law which "otherwise provides".

On the question whether the appellant had acted out of time the following facts and dates are relevant:

7 February 1983:	Decision was pronounced by the Penolong Pengarah Buruh.
19 February 1983:	Notice of appeal was received in the Labour Department.
5 March 1983:	Date of notice that appeal record was ready.
18 March 1983:	appellant's solicitor was informed by the Labour Department by phone that appeal record was ready.
5 April 1983:	Memorandum of appeal was filed in the High Court.

There is no evidence to show on what date the notice that appeal record was ready was served on the appellant or on its solicitors. In my Judgment 18 March 1983 should be treated as the date of which such notice was served on the appellant, because that was the date the Labour Department informed the appellant's solicitor by phone that the appeal record was ready. The appellant has not shown in its affidavit that such notice was served after 18 March 1983. Therefore under O. 55 r. 2 (1) of the Rules of the High Court 1980 memorandum of appeal should have been filed not later than 1 April 1983, but it was filed on 5 April 1983. The burden is upon the appellant to show that it was filed within time. The appellant has failed to do so. Therefore this appeal is dismissed, with costs to Selvarajah (respondent).

Also found at [1985] 1 CLJ 84